

SHARI'A IN THE CONSTITUTIONS OF INDONESIA, TUNISIA AND EGYPT: A COMPARATIVE ANALYSIS²⁹

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ABSTRACT

The constitutional revision processes in the aftermath of the collapse of the authoritarian regimes is very important to ensure the successful scenario of the shift from the authoritarian regime to the democratic system. It is surely true that having toppled down a despotic ruler; a democratic state will not automatically be its outcome. If a clear demarcation between authoritarian regime and democratic rule is going to be made, a successfully constitutional reform is necessary.

In many non-Muslim states, constitutional reform focuses on two basic structural issues: (1) the limitation of the state in the form of a set of rights and freedoms of the citizens, and (2) the separation of powers within the state. By contrast, in most Muslim countries, two quite different issues largely attract political attention throughout debates on constitutional reform: (1) the religious rights of Muslim citizens to freely apply shari'a, and (2) the obligation of the government to arrange properly for the implementation of shari'a rules in the country.

This paper addresses the constitutional position of shari'a in three Muslim countries: Indonesia, Tunisia and Egypt. It compares efforts of Islamic political parties in those countries to have shari'a constitutionally acknowledged or to give it more powerful

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constitutional status. Despite this kind of proposal has been able to attract and to gain support from some segments of Muslim population in those countries, there always have been stiff resistance from other groups and individuals with secular-liberal backgrounds.

KEYWORDS: Shari'a; Constitution; Indonesia; Tunisia; Egypt

INTRODUCTION

The unprecedented and contagious revolutionary movements in the current Arab world have wondered many as to whether this so-called 'Arab Spring' would lead to. Some expressed enthusiasm and optimism, but there also others who do not believe in the bright future of democracy in this part of the world. Both optimism and pessimism are grounded on the way in which political transition transpires in a country.

For the pessimists, this has to do partly with the fact that, historically, none of Arab countries in the aftermath of revolution that took place in the past century have ever come to embrace political pluralism, religious tolerance and human rights protection including for women. Nevertheless, the optimist considered the current revolutionary wave would provide a greater chance for democratizing the Arab world.

The constitutional revision processes in the aftermath of the collapse of the authoritarian regimes are very important to ensure the successful scenario of the shift from the authoritarian regime to the democratic system. It is surely true that having toppled down a despotic ruler; a democratic state will not automatically be its outcome. If a clear demarcation between authoritarian regime and democratic rule is going to be made, a successfully constitutional reform is necessary.

In many non-Muslim states, constitutional reform focuses on two basic structural issues: (1) the limitation of the state in the form of a set of rights and freedoms of the citizens, and (2) the separation of powers within the state. By contrast, in most Muslim countries, two quite different issues largely attract political attention throughout debates on constitutional reform: (1) the religious rights of Muslim citizens to freely apply shari'a, and (2) the obligation of the government to arrange properly for the implementation of shari'a rules in the country.

The high priority placed on the issue of shari'a in particular is mostly based on the classical juristic traditions that emphasize that the ultimate goal of the state is to apply shari'a to guarantee the happiness of its subjects in this world and to avoid punishment in the hereafter. For this reason, constitutional reform in many Muslim countries was often occupied by the proposal of Islamic parties to give shari'a a much stronger constitutional status. Despite this kind of proposal has been able to attract the Muslim majority population in those countries and to gain their support, there always

have been stiff resistance (based on human rights discourses) from other groups and individuals with secular-liberal backgrounds.

This paper would like to address the constitutional position of shari'a in three Muslim countries: Indonesia, Tunisia and Egypt. It will especially look at the on-going processes of constitutional revision in Tunisia and Egypt. Before delving into details of each country, I would like first to share with you two general observation.

First, the question of who leads the transitional period while the new constitution is being amended or redrafted has been a key factor to determine the final outcome of constitutional processes. In Indonesia, the new president who succeeded Soeharto was his vice president Habibie. Although he was a close ally of the former authoritarian president, Habibie was a civil democrat. He was no longer in the office when all processes of constitutional reform were completed in 2002. Yet, many would agree that President Habibie was one of important figures who played a greater role in making all constitutional and institutional changes required for establishing a democratic system, and especially for organizing a fair and free parliamentary election in 1999.

In Tunisia, the Prime Minister Mohammed Ghannouchi had briefly claimed to be the new President replacing Ben Ali, but this self-claim was contested by many to be in disagreement with the Tunisian constitution. Fouad Mebazaa was then instead appointed as Acting President following the Constitutional Council's interpretation over the constitution and with regard to the emergency situation. Although he was part of the former authoritarian regime (he was member of the Central Committee of the former ruling party, Constitutional Democratic Rally), Mebazaa was a good technocrat and politician. He was able to ensure that a fair and free election (October 2011) taking place during his short term in the office (15 January-12 December 2011). He was then succeeded by Moncef Marzuki who was unanimously voted by the newly elected Tunisian parliament members.

In Egypt, following the resignation of President Mubarak on 14 February 2011 after being in the office for almost thirty years, the presidential power was supposedly transferred to his vice President Omar Suleiman. Like PM Ghannouchi in Tunisia who could only occupied the state leadership for a single day, Suleiman also faced the same situation. However, unlike in Tunisia where a single person succeeded the presidency, in Egypt, the Supreme Council of the Armed Forces (SCAF), which consists of 20 senior military officers, was determined to govern Egypt until the new President elected in June 2012 (this month).

Second, the abstention of the army, as well as the police forces, from involving in the primary political position during the transitional period plays a vital role to bring out a fruitful outcome toward democratic system. While in Indonesia and Tunisia, their

army senior officials were refraining from directly taking a leading part in the executive branch of government; the reversed situation has been observable in Egypt. The SCAF under the interim constitution has a wide range of authority from making legislation, issuing public policies and offering appointments to reducing punishments. This is very contrast, for an example, to the Indonesian army and police officers who only had a minor political authorities and privileges including to send their 38 appointed representatives to the parliament to amend the constitution.

In the following section, I will explain efforts of Islamic political parties in those three countries to have shari'a constitutionally acknowledged or to give it more powerful constitutional status. The paper will argue that the failure of the constitutionalisation of shari'a in these Muslim countries has to do not only with unresolved deficiencies within Islamic parties, but also largely to do with strong resistances by other elements of society in those countries. Finally, the paper will offer some comparative remarks.

CONSTITUTIONAL AMENDMENT IN INDONESIA

The fall of the Soeharto authoritarian regime in 1998 brought new opportunities for major political changes in Indonesia. These changes were crucial to transform Indonesia from an authoritarian state to a democratic country. Many Indonesians condemned the 1945 constitution, before being amended, as the root cause of dictatorship of the outgoing President Soeharto. It contained conditions that make authoritarianism possible. In fact, the 1945 constitution was widely criticized for being very 'executive heavy', with too much power being concentrated in the hands of the president.

The political shift from an authoritarian to a more democratic order has given Indonesian people a fresh beginning for rebuilding the nation and consolidating upon existing legal systems. Triggered by demands for legal reform, the place of religious law (or sharia) and its institutional presence in Indonesia has been an important agenda for numerous Indonesian Muslim groups. This kind of aspiration was actually gaining in significance because with the political liberalisation in the wake of Soeharto's fall, each individual or group feels free to express their goals and interests.

Calls for constitutional status of sharia in Indonesia were often echoed through a demand to bring the popular phrase of 'Tujuh patah kata Piagam Jakarta' or seven words of the Jakarta Charter back into the Indonesia's constitution. This phrase was actually part of the first draft of the preamble to that constitution. It contained what has since become a very well-known phrase in Indonesia, consisting of seven words: *dengan kewajiban menjalankan syariat Islam bagi pemeluknya* [with the obligation of carrying out Islamic shari'a for its adherents]. This phrase, famous today simply as the

‘seven words’, was eventually removed from the final and ratified draft of the preamble on 18 August 1945. For one view, the deletion of the seven words that day was a temporal or conditional consensus, and, hence, a tentative agreement, but for the other, the withdrawal of the seven words was a substantial agreement, and, hence, a decisive agreement, made by the Founding Fathers of the country for the sake of Indonesian unity. Since then, however, the status of the ‘seven words’ has been a constantly controversial issue.

The struggle for the seven words has remained an ongoing issue in Indonesian politics. It arose repeatedly during the history of Indonesia since its independence in 1945. Attempts to reintroduce the Islamic *shari`a* into the Indonesian Constitution have been made at least three times. The first attempt was in the meetings of the Constituent Assembly from 1957 to 1959. The second effort took place in the first years of the New Order era (1966-1998), during the meetings of the Annual Session of the People Consultative Assembly from 1966 to 1968. Finally, the third attempt occurred during the process of constitutional amendment in the annual meetings of the People Consultative Assembly in 2000, 2001 and 2002. All these attempts were, however, unsuccessful.

Before going further, I will present here the result of the 1999 Indonesian election as the context of constitutional reform in Indonesia from 2000 to 2002. Of 462 seats being contested, the nationalist wing-Struggle Indonesian Democratic Party (PDIP) won the election by occupying 153 seats (33 per cent). Next as the runner up, the nationalist ruling party under Soeharto regime (Golkar) came up with 120 seats (around 22 per cent). Two Islamic parties (PKB and PAN) with a strong national ideology got 51 seats (12 per cent) and 34 seats (7 per cent) respectively. All other Islamic parties together controlled around 16 per cent with 88 seats. If all seats of Islamic parties, regardless of their different political orientation, are combined against other non-Islamic parties, that resulted in 173 seats (35 per cent) vis-à-vis 289 seats (65 per cent).

The main focus of Islamic parties during the constitutional amendment was their proposal for the reinsertion of the seven words of the Jakarta Charter into Paragraph One of Article 29: “The state is based on belief in One God”.

A heated debate between contending factions over the constitutional status for Islamic *shari`a* took place mostly in 2002. The Islamic faction can be identified as the pro-amendment camp. They proposed two alternative drafts by inserting ‘seven words’ which then the Article would be amended as follows:

- The state is based on belief in One God *with the obligation to enforce Islamic shari`a for its adherents*.

- The state is based on belief in One God *with the obligation to enforce religious teachings for respective believers*.

Other factions, we may call them the nationalists, which include nationalist parties and Christian parties and the representative of army and police forces (F-PDIP, F-PG, F-KKI, F-PDKB and F-TNI/Polri) formed the contra-amendment camp. They all maintained the original text of the Constitution.

There were four arguments presented by the Islamic faction to propose the amendment to Article 29 with the inclusion of seven words. First, the proposal was closely related to the Presidential Decree on 5 July 1959, which acknowledged the position of the Jakarta Charter to have inspired and influenced the constitution. Second, every religion teaches about faith and piety, and hence, to include the seven words into the Constitution would be a solution to the perceived moral decadence of the country. Third, Islamic *shari`a* would be applicable only for Muslim adherents, so followers of other religions had no need to be concerned. And fourth, the reinsertion of the seven words of the Jakarta Charter into Article 29 would clarify the constitutional position of *shari`a*. Thus, any proposal for incorporating an aspect of Islamic *shari`a* in the Indonesian legal system would be justified.

Meanwhile, the anti-amendment camp, or the nationalist faction, (F-PDIP, F-PG, F-PDKB, F-KKI, and F-TNI/POLRI) offered four reasons to oppose the amendment to Article 29 and to maintain the original text. First, they considered national integrity was much more important than the political interests of any particular group of citizens. Second, since Indonesia is a *Pancasila*, and not a theocratic, state, the state has no right to control the observance of religious duties by its citizens. Third, stipulations in the Body of the Constitution should not contradict what has been already stated in the preamble. For this reason, both the preamble and the text of Article 29 must be consistent and coherent. The final reason for resisting the effort to amend Article 29 was because to mention the rights and obligations of one particular religion in the Constitution at the expense of other religions would violate the principle of equality.

Although Islamic parties have been struggling to formally constitutionalize the implementation of *shari`a* in Indonesia, this is frequently failed and rejected by various groups criticizing what they mean by the term *shari`a*. A majority of Indonesian Muslims, at least as represented by the two biggest Islamic organizations: Nahdlatul Ulama (NU) and Muhammadiyah, have very different visions of *shari`a*. They opposed the proposal of the Islamic parties to amend Article 29. When asked over the stance of the NU opposing the insertion of seven words into Article 29 of the Constitution, Hasyim Muzadi, chairman of NU, said that NU does not expect *shari`a* to be codified as state law, but merely as communal directives for Muslims.

CONSTITUTIONAL REVISION IN TUNISIA

In the late March 2012, the European Union Institute for Security Studies (EUISS) invited me to Tunis and Cairo. I was asked to deliver a seminar on religion, politics and the state with a special reference to Indonesia. As the largest democratic Muslim country in the world, there has been a lot of interest in Indonesia. In particular, Tunisian people have less information on political experiences of Indonesia during its transition period to democracy in the last fourteen years. Instead, many Tunisian have been overwhelmed by information they get from democratic experiences of Turkey. For many secularists and liberalists, Turkey's experience is the best, and, hence, worth adopting. Nevertheless, given the result of the last year election in which an Islamic party (i.e. Ennahda) won a majority of parliamentary seats, Turkey's model would not be easily accepted. In fact, it is unclear if the Ennahda party wished to follow exactly the development of democracy in Turkey. It is for this reason, some have looked at Indonesia and sought to learn from its democratic experiences.

It must be immediately added here, however, that although Tunisian political leaders looked for other countries' experiences, this does not mean they do not learn from their past experiences. Since Tunisia became an independent state in 1956 until the Jasmine Revolution in early 2011 (54 years and half), there were only two persons ruled the country: Habib Bourguiba and Ben Ali who were both despotic presidents. The same is almost true for Indonesia, where two authoritarian presidents (Soekarno and Soeharto) led the country for almost 53 years, from August 1945 to May 1998. Interestingly, in the aftermath of dictatorial powers, while Indonesia keeps the presidential system, Tunisia (at least for the election winner Ennahda party) withdraws it and prefers to have a parliamentary system. Meanwhile, some other parties (e.g. CRP and PDP) still expected to have a presidential system, but with a slight modification that resembles a semi-presidential government. The renunciation of presidential system by many Tunisians perhaps has to do largely with their worst experience when presidential government exercised in Tunisia since independence.

The post-revolutionary Tunisian election took place on 23 October 2011. The result of this election brought the Ennahda party to relatively dominate the parliament with 37 per cent of votes, or 89 of 217 seats. The rest (128 seats) was shared among 17 political parties and independent candidates. Taken together, all these 217 members formed the Constituent Assembly whose main task has been to draft a new Tunisia's constitution in. As mentioned above, the composition of National Constituent Assembly of Tunisia is exactly the format of Indonesia's constitutional drafters during the last constitutional amendment in 1999 to 2002, which gained their mandate to revise the constitution by way of election rather than through an appointment. Nonetheless, unlike Indonesia that was supposedly to amend its existing constitution (albeit with a

substantial revision), Tunisia decided to prepare a newly drafted constitution different from the one which was promulgated by President Bourguiba in 1957.

Similar to the 1945 Indonesia's constitution, the 1957 constitution of Tunisia does not prescribe anything with regard to the implementation of *shari'a*. Yet, Article 1 of Tunisia's constitution stipulates that Islam is the official religion of the country: "Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic and its type of government is the Republic".

As far as the introduction Islamic *shari'a* into the Tunisian constitution is concerned, some have been alarmed by the domination of the Ennahda Islamic party in the People Assembly. The Ennahda founder and leader, Rachid Ghannouchi, has repeatedly stated that his party would be happy to retain the first clause of the previous constitution without pushing for *shari'a* into the constitution. At an occasion before the election, he said "there will be no other references to religion in the constitution. We want to provide freedom for the whole country." Despite this, the party has not announced its final position. In light of such condition, a delegate of Ennahda party in the People Assembly, Ali Fares, was quoted to say that *shari'a* "must be a principal point of reference in our constitution".

It became apparent that the place of *shari'a* had been booked into the Tunisia's constitution. Some Ennahda leaders took a different stance after the election by seeking to set *shari'a* as a principal source of legislation. Like the previous Egyptian constitution under Presidents Sadat and Mubarak, the draft constitution being considered by the Tunisian People Assembly was stating, "Using Islamic *shari'a* as a principal source of legislation will guarantee freedom, justice, social equality, consultation, human rights and the dignity of all its people, men and women." It is quite unclear where this particular phrase would be located whether in the constitutional preamble or in Article 1. If its location was to be found in the preamble and Article 1 remains untouched, the Ennahda party leaders who proposed such particular phrase probably would not feel guilty because of being not consistent with the promise they had made earlier.

Constitutional drafters from other parties objected the Islamic party's proposal to place *shari'a* into the new constitution of Tunisia. It was reported that Nadia Chaabane, a member of a small modernist group that advocates for gender equality and separation of religion and politics – and holds five seats – was contending the proposal saying:

"While we need to be in harmony with our identity, we cannot use the *shari'a* as a source of legislation because it can disrupt the balance of Tunisian society,"... "Even if we did use it – whose version will we follow? *Shari'a* is so vague and unclear – it needs a lot of interpretation. Moroccan interpretation, for instance, is not the same as Iranian."

The statement made by the Ennahda leader, Rachid Ghannouchi, on 26 March 2012, seemed to direct Ennahda's withdrawal from proposing *shari'a* into the new

constitution of Tunisia. His strong messages seemed to end the controversy of the position of shari`a in the constitution. He was quoted to say:

“We do not want Tunisian society to be divided into two ideologically opposed camps, one pro-Sharia and one anti-Sharia. We want above all a constitution that is for all Tunisians, whatever their convictions.”

Following this, a senior party official, Ameer Larayed told Radio Mosaïque that “Ennahda has decided to retain the first clause of the previous constitution without change”... “We want the unity of our people and we do not want divisions.”

As it was explained by Duncan Pickard, the decision of the Ennahda party to renounce the introduction of shari`a into the constitution was made by the high consultative council of the party, which consists of 120 elected members. Of the 80 members who attended the internal debate Over the issue in question, only 12 members supported the inclusion of shari`a into the constitution. It was said that the high council of the Ennahda party came out with such decision due to a number of reasons: (1) the plural meaning of shari`a is likely to be misinterpreted by public or judicial authorities; (2) the issue of shari`a in the constitution is not that important to the party when compared with other political and socio-economic problems facing the country; (3) the pre-election platform of the party (i.e. no reference to shari`a in the constitution) needs to be maintained as it would bolster the stance of the party that adopts the constitution by consensus; (4) the shari`a issue has emerged as a red line for the non-Islamic parties. Moving beyond this would only bring the separation of Tunisian people; and (5) the party leaders sought to show the world that including a reference to shari`a is not necessary for creating a democracy, which is compatible with Islam.

As now the ruling Ennahda party guaranteed that no reference to shari`a would be made in the new constitution of Tunisia, the discussion in the People Assembly has become a bit lighter. Its current focus shifts from fundamental to be more institutional and procedural issues. Given this, the head of the People Assembly, Mustapha Ben Jaafar, has been ensured that the Assembly would complete its assignments in due course. In fact, he has announced that the deadline for Tunisia’s new constitution is 23 October 2012, which is quite earlier than it was scheduled. As the process of drafting the new constitution commenced only on 13 February 2012 and would last for eighteen months, the People Assembly actually still has a plenty of time to finish their job. If all goes smoothly as it is predicted now, the legislative and presidential elections will be held under the new constitution by March 2013.

CONSTITUTIONAL DEADLOCK IN EGYPT

Unlike Tunisia that apparently has steered constitutional revision on the right track, the same effort in Egypt has been somewhat paralyzed and almost led to a no through road. Many people in Egypt have sensed of uncertainty about the future steps in political transition. This uncertainty has to do largely with unclear direction as to whether Egypt would have for the first step a newly elected president by the people or to have a newly drafted constitution by the Constituent Assembly.

According to a plan forwarded in November 2011 by the Supreme Council of the Armed Forces (SCAF), or the transitory military authority, that took over the power to govern Egypt following the overthrowing of President Mubarak in February 2011, a new constitution should be drafted before the presidential elections held in June 2012. However, as the formation of the Constituent Assembly that would prepare the draft constitution remains very problematic, no one argues anymore, including the SCAF, about the necessity to hold presidential election even before having the new constitution completely drafted. This May 23 and 24 are scheduled for the Egyptians to give their votes for a new president in the post-revolutionary Egypt. And if none of thirteen qualified candidates is able to gain more than 50 per cents of the votes, a run-off election will take place on 16-17 June 2012. This second round poll is to decide which one of the two candidates with the highest number of votes to be the new president of Egypt.

Different to Indonesia and Tunisia whose constitutions do not mention shari`a at all, the constitution of Egypt has included the term ‘shari`a since its constitution ratified in 1971 under President Anwar Sadat. Article 2 of this constitution stipulates that “Islam is the religion of the state, and the Arabic language is its official language. “Fundamentals of Islamic sharia **are a** principal source of the legislation (Mabadi’ al-shari`a al-Islamiyya **masdarun rai’isiyyun** littashri’).”.

ومبادئ الشريعة الإسلامية مصدر رئيسي للتشريع

Due to political pressures from Islamic groups, this particular clause was then amended in 1980 and its wording changed to the more forceful statement: “Fundamentals of Islamic shari`a **are the** chief source of the legislation (Mabadi’ al-shari`a al-Islamiyya **al-masdar al-rai’isiy** littashri’).”.

ومبادئ الشريعة الإسلامية المصدر الرئيسي للتشريع

According to Lombardi (1998: 86), the change in the wording of this Article 2 transformed the formerly innocuous into potentially powerful clause. However, the

implication of this change was vague as what exactly this amended Article meant or what precisely the government should enforce was not clarified.

What does it mean for (fundamentals of) shari`a to be the chief source of legislation? It was unclear whether the amended Article 2 makes shari`a the preferred source of legislation, or the source of the legislation which controls all other legislations. Lombardi (1998: 87) has discussed this issue in detail and explained that for the Islamic groups, the revised clause means the supreme source. Thus, all Egyptian laws must accord with the rules of Islamic shari`a, and any existing laws that contradicted shari`a would have been revoked. However, in the view of the secularists, the altered Article 2 made shari`a at most the preferred form of legislation. Thus, they argued, the legislature should consider the dictates of shari`a in enacting legislation, but it was not bound to follow any particular version of shari`a laws—it would be free to modify traditional rules of shari`a whenever the shari`a seemed anachronistic or impractical.

Despite the change in wording of Article 2 in 1980, the legislation as well as the enforcement of shari`a thereafter by the Mubarak government has not fulfilled expectation of many people from the Islamic groups. The new hope for a fully practical shari`a application in Egypt emerged as the authoritarian regime collapsed in early 2011 and Islamic groups have been able to dominate the parliament following the first free election in November 2011. Two leading Islamic parties, the sponsored-Muslim Brotherhood Freedom and Justice Party (FJP) and the Salafist Annour Party, were both successful in securing a significant majority vote from the people. Of 508 members of the Egyptian People Assembly or the lower house, the FJP occupies 213 seats while the Annour party holds 107 seats. Together with other tiny parties (38 seats) that form two separate big coalitions, the overall percentage of seats controlled by these two coalitions (Democratic Alliance and Islamist Bloc) in the lower house is about seventy (70) per cent. This figure is more than enough to push for enacting more shari`a legislation and to demand its vigorous application in the country.

What are stances of both parties (FJP and Annour party) regarding the formulation of shari`a for the new Egyptian constitution? Although the final word on this issue remains unknown, we have heard some of their leaders envisioning the implementation of shari`a in Egypt. Both parties' leaders support and promise the enforcement of shari`a during their campaign rallies towards presidential election this month.

Nevertheless, when it comes to the constitutional revision on Article 2, they have different proposals. It appears that the Muslim Brotherhood-FJP would have left the Article 2 intact should the Constituent Assembly were working well. Meanwhile, the Salafist Annour party wanted to change the wording of Article 2 by deleting the term '*mabadi*', which is now located before the phrase al-shari`a al-islamiyya, and replacing

it with another word '*ahkam*'. If this proposal is considered too much, this party would be happy enough if the word '*mabadi*' can be removed from Article 2. This is because, according to this party, the term brings ambiguities in which meaning and interpretation of shari'a when it comes to its enforcement.

As far as the unequivocal implementation of shari'a in Egypt is concerned, the motivation of the Salafist Annour party to delete the word '*mabadi*' is justified. As noted by Lombardi (1998: 91), all conflicting interpretations of shari'a related to Article 2 must be settled by the Supreme Constitutional Court of Egypt. This is the special court that stands outside of the regular court system, and it has often been requested to define Islamic shari'a and to determine what it means to be the principal source of legislation. In a number of cases, the Supreme Constitutional Court has understood fundamentals (*mabadi*) of Islamic shari'a to consist of all laws which conform to the broad legal principles that were laid down in the Qur'an and which have been accepted by all Muslim jurists over the years. Thus, if legislation does not violate the fundamental principles of Islamic shari'a, it is in keeping with the shari'a and does not violate Article 2. Additionally, according to the Court, Article 2 should be conceived of as the application of general principles that function to advance certain divinely-favored social outcomes. With this in mind, it is no wonder if the Salafist Annour party, an ultra-conservative Islamist party that maintains a literal version of Islam, sought to modify Article 2 by removing the term '*mabadi*'. In their view, such sloppy interpretation by the Court would not be acceptable if the term '*mabadi*' is removed from Article 2.

Although these two Islamic coalitions in the Assembly secured almost 70 per cent of seats, an attempt to make Islamic shari'a more clarified in the new constitution of Egypt, or more powerful in its enforcement as the Islamic parties wanted, is not like taking candy from a baby. The road towards a new constitution, let alone to give shari'a more authoritative status, is not that easy and requires a very long process. This has mainly to do with the fact that the elected members of the People Assembly are not authorized to draft a new constitution. Instead, according to the interim constitution (Article 60) adopted by the SCAF in March 2011, the institution that would draft a new constitution is the constituent assembly. This special assembly consists of 100 participants and will be chosen by all elected members of the Egyptian Bicameral Parliament (the People Assembly and the Shoura Councils; the latter or the upper house has 180 members in total, whereas 150 of them come from the two Islamic coalitions). The Constituent Assembly (CA) has been assigned to complete a draft constitution within 6 months after its formation. The interim constitution, however, does not prescribe criteria and procedures on how to form a 100-person Constituent Assembly, which in turn has generated problems and became a battlefield between various parties in Egypt.

The process of electing 100 members of the CA has been a very complicated. The question over how many people will be elected from members of the parliament and from other individuals representing Egyptian plural society cannot be tackled easily. Instead of consulting widely with other Egyptian stakeholders, as they had promised, the Islamic parties that own two thirds of seats set to monopolize the CA by appointing their affiliates who share the same ideology and interest. In the final move, they were able to gain almost 60 out of 100 seats of the CA. Of more than 40 remaining seats, only five members are female and only six members representing Coptic Christians. Strangely enough, the composition excludes some Egypt's prominent constitutional scholars.

As the Islamic parties dominated the CA, some appointed members from non-Islamic parties immediately withdrew in protest of such outcome. In fact, non-Islamic parties responded crossly protesting Islamic dominance and demanding that the CA should have included all political forces in Egyptian society. It was further argued that the composition of the CA does not represent all Egyptians and the 25th January revolution. In the critics' opinion, to have won the parliamentary elections does not necessarily means domination in the formation of the CA that will create a new constitution, by which Egypt would be governed for years or decades. The Islamic parties denied the allegation of seeking hegemony over the CA. They contended that they acted within the law; that the CA is representative; and that the secularists would have done the same way should the political configuration were the other way around.

The current formation of the CA, however, cannot survive any longer. This not only because some of its members withdrew from participating in the meetings of the CA, but also because on 10 April 2012 (only fifteen days after its formation on 26 March 2012) the administrative court in Cairo suspended the CA's activities without plainly explaining the reasons. It was said that the CA was made null and void by the judicial decision for being dominated by Islamists and failing to fairly represent Egypt's diverse society. Islamic groups responded by considering the court decision is defective. Nevertheless, without complete legitimacy, the outcomes of the CA meetings, if they were to go on, would not be legitimate either.

Given this impasse, in the first week of June 2012, the SCAF sent a 48-hour ultimatum urging all political parties to negotiate and agree on new criteria for reselecting 100 members of the constituent assembly to draft a new constitution of Egypt. Otherwise, the SCAF would either unilaterally draw up a new constitution or restore the 1971 constitution, which was frozen following the resignation of President Mubarak in early 2011. By Tuesday, 12 June 2012, all political parties have agreed that a full balance and representation of all powers and interests to be taken into account when remaking the constituent assembly. This constitutional panel would be made up of 39 members of political parties, in which 24 seats are given to the two biggest Islamic

parties (the FJP and the An-Nour) respectively. The remaining 61 seats would be divided up to various national and public figures including union members, lawyers, judges, professionals, state officials and religious leaders.

The political developments in Egypt change very rapidly. Just two days after the constituent assembly was re-established and three days before the runoff presidential election, the Supreme Constitutional Court dissolved the Islamist dominated parliament. The Constitutional Court issued this ruling because of problems relating to the law of the composition of the parliament, in which it says that a third of its members must be occupied by non-parties representatives. Also on the same day, the Constitutional Court ruled that Ahmed Shafik, a former prime minister under the overthrown President Mubarak, was confirmed to contest in the runoff presidential election.

Despite now Mohamed Morsy was finally elected as a new President of Egypt and recently has reshuffled military leadership, the pathway to create a newly democratic constitution for the future Egypt remains vague at most. The constitutional democracy in Egypt is too slippery, and although it may be too soon to predict, the current politically open atmosphere could end up either in a chaotic political system or an authoritarian rule. In the view of a senior Egyptian female scholar, the future of political transition in Egypt has two scenarios: (1) toward democratic state, and (2) toward non-democratic state. In her opinion, democratic scenario would come true only if Islamic parties who hold majority seats are willing to lower their demands and are ready to make crucial compromises. While non-democratic scenario would become a reality if Islamic parties insist to continue with their firm religious agendas including to set the position of shari`a more tangible and profound in the constitution.

CONCLUSION: SOME COMPARATIVE LESSONS

None of three countries presented here has all positive ways in its entire process of constitutional reform. While the process of constitutional amendment in Indonesia was done long ago and constitutional revision processes in Tunisia and Egypt are still on going and even far from complete, a number of commonalities and differences from these three countries are perhaps important to be outlined as lessons learnt.

The first is the fact of which party (Islamic or otherwise) that won a majority seat of the parliamentary election has been an important device that would define whether a country is going to accommodate equally a pluralistic society or to have an exclusive and discriminatory legal system. Although both Indonesia and Tunisia have seen Islamic parties were able to gain between 30 to 40 per cent of the total parliamentary seats (in fact the Ennahda Islamic party in Tunisia was the winner of the 2011 election), they all could not easily introduce the shari`a into the constitution. In Egypt, two Islamic coalitions are able to dominate the parliament by holding two third

of the seats. One would predict that should the constitutional revision in Egypt goes on with this political configuration, the position of shari'a in the new Egyptian constitution may become more powerful.

The second is the issue of which institution that is assigned to draft, or amend, the constitution is quite significant to confirm a successful constitutional reform. Unlike Indonesia and Tunisia whose parliament or people assembly automatically turn to be the CA, Egypt decides to establish a separate institution to draft a new constitution. The Egypt's People Assembly together with the Egypt's Shoura Council are jointly responsible for establishing a constituent assembly. From comparative constitutional view, the constituent assembly is less successful than the parliament in revising, or remaking a new, constitution. A study by Hassall and Saunders (2002) revealed that the experience of a number of countries in the Asia Pacific region demonstrated that the constituent assembly is often failed in achieving its ultimate objective due to the tension with the transitory power or the incumbent government.

The third is the extents to which political parties or other involved stakeholders are able to agree on a number of fundamental issues. Having a pre-consensus among members of the constitutional assembly before they start drafting a new constitution is somehow critical to produce a new constitution that is for all subjects of the country. Prior to their meetings, Indonesian parliament members had agreed on five issues: (1) to keep the preamble of the constitution unchanged, (2) to maintain the form of the state as a unitary republic, (3) to retain the presidential system, (4) to amend the constitution by addendum (inserting more paragraphs), and (5) to incorporate norms and principles as found in the Elucidation of the 1945 constitution into the Articles of the constitution. A slightly similar situation seems to be present in Tunisia as described above, but it is totally absent in Egypt.